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Vol. VII JULY, 1930 No. 9

THE BAR PICNIC

THE annual Bar Picnic has come and gone. It remains only to leave upon these pages an imperishable tribute, that generations to come may read and marvel.

The event was scheduled for approximately Two P.M. on Thursday, June 26th, and from twelve o'clock noon an increasing atmosphere of peace began to enfold the City and County of Denver, while, in corresponding proportion, distinguished barristers, solicitors, advocates, arbiters, counsellors, and the like, began to congregate on, in, or about the Mount Vernon Club-house.

Some two or three hours later the scene presented was one of incredible activity. Thousands of acres were being tilled by the indefatigable members of the Bench and Bar engaged at the game of golf. Motions to strike were being made on every hand, waived, and then argued. Petitions for an accounting and dissolution of partnership were presented and argued at frequent intervals and rehearings were being denied and at the same time heard at practically every tee. It was reported that no less than twenty-three holes in one were alleged made, and all scores were remarkably low. After disallowing all scores turned in that were more than fifteen strokes under the world's record for an equivalent number of holes, the award for lowest gross score went to Churchill Owen with a thirty-six. The lowest net score prize went to Edwin Park, but the figure was not announced, lest a riot ensue.

These awards were deserved, even if not won, inasmuch as great legal skill and ability in argument was a requisite to victory in any event. Often hours of severe cross-examination were necessary to break down an opponent's story as to his score.

Bill Koolbeck and Jack Phelps tied for runner-up on low gross score, but, upon threat of an auditing committee, each

conceded honors to the other. Mr. Phelps spoke before witnesses, however, so Mr. Koolbeck, of course, was awarded the prize. For similar reasons the tie resulting from the terrific struggle between Fred Sass and Judge Luxford was finally decided in favor of the former, and the prize awarded to Mr. Sass for winning something or other. Special mention was given Casey Kirk as holder of the most impressive score, as he turned in a sixty-eight and still seemed unweary. Harry Saunders gave Casey a hard contest, but, after setting the brilliant pace of thirteen strokes on No. 7, cracked under the strain and improved slightly.

The horseshoe courts presented a scene of mixed pathos and hilarity. The contest was captured by Al Gould after a dramatic scene when, with the score at 19 to 20, Dusty Rhoads carelessly knocked one of Al's shoes over the stake for a ringer. The winner collapsed.

A note of tragedy was supplied by Ed King, who, after a brilliant victory in the preliminaries, was retired by Cliff Mills, who threw four ringers in succession, his first two times "at bat". Mr. Mills modestly refrained from throwing another ringer during the entire afternoon, which caused Mr. King to feel rather put upon.

One of the most brilliant but unheralded victories of the day was that of the said Mills in talking Clyde Barker out of a leaner, neither contestant knowing the rules relative thereto but Mr. Mills' invention covering the situation being presented in a most forceful and plausible manner.

Judge S. Harrison White, after a terrific drive for first honors, weakened under the strain, except vocally, and was forced to concentrate on the booby prize, which he won over very severe competition.

Baseball honors went, after a vigorous battle, to the Bench Ten who were acclaimed victors over the Bar Nine. The medal for the most valuable player went to Luke Kavanaugh, the tenth man on the Bench team, who acted as umpire. The actual score, in spite of Mr. Kavanaugh's heroic efforts, was 16 to 10 in favor of the Bar, but the Bench interposed a motion for judgment *non obstante scoro,* which they readily granted. It is rumored that an anonymous letter will be sent the Grand Jury relative to this entire contest, by

Captain Healy of the Bar Nine, and the Committee is already hard at work checking up on the number of pending hearings or appeals in which Mr. Kavanaugh is interested.

High points in the ball game were the astounding twirling exhibitions of Carlos Stratton with his patented bean-ball, and Charlie Sackman with his unhitable ground-ball, together with the remarkable achievement of left fielder Gould, who interrupted his leisurely guzzling of pop while on duty and caught a high fly. Mr. Gould was so overcome by this success that he was forced to seek nourishment by consuming the remainder of the pop before sending the ball back into play.

Except for the hitting and fielding, the game was remarkably free from errors, only two of importance occurring, one being chalked up against Bob Steele, the "Iron Man" of the bench, who had to be hauled off to Golden for repairs after spraining an ankle sliding into first. The second error goes against Al Gould, who let go of the bat during a healthy swing and nearly retired Judge Sackman and a surrounding group of Benchers, permanently. As the distance was short, there was some criticism of Mr. Gould's inaccuracy.

Bridge was also played, and at this contest Bill Koolbeck and Paul Lee emerged victors at auction and contract respectively. Judge Alter was runner-up at auction and Elston Whitney at contract. Both runners-up were secretly bloated with pride at their achievement but attempted to indicate that they were heart broken at having failed of the supreme goal. Dick Peete, pride of the University Club, decisively won the booby prize at contract, but Bob Stearns put up such a gallant battle for it that he was awarded a special booby prize in appreciation of his efforts.

In the tennis tournament first honors went to Harold Wagner and S. J. Frazin and runners-up were Roy Wagner and J. L. Weinmeyer. The reporter failed to see this contest but, on interviewing the players, received identical reports from all concerned, to-wit, "We outplayed them all the way."

An unexpected incident in the general bestowal of awards was the gift of a diamond ring each to Judges White and Orahood, with an inscription from the American Auto Race Drivers Association in appreciation of the entertainment and

housing facilities provided many of its members during the past judicial year. To avoid publicity, the actual delivery of the rings was postponed until a report could be had from Judge Calvert as to when the Grand Jury would disband.

In full compliance with the representations contained in the Bill of Particulars sent out by the Outing Committee, dinner was served at seven P. M., and proved highly edible. Dean Manly, pinch hitting as Master of Ceremonies, demonstrated his mastery thereof and cut fifteen minutes off the scheduled time, which is no mean deed.

The Robert L. Stearns movies of last year's outing were good, and in addition many of the stars were present personally, which added greatly to the applause accompanying the screen appearances of the said stars.

The concluding rocket of achievement was the appearance of "Eurton and Mann and Dancing Girls". As to this —! Suffice it to re-echo the statement of the program:

9—Girls—9

They Sing—THEY DANCE!

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1930-1931

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THE INDIAN AS A LAWYER

By Editha L. Watson

REACHING as far back as mankind itself, we find Law. The need of customs directing the lives of human beings, so that the most good might be done to the greatest number, must have been felt from the earliest dawn of reason. Such customs are the progenitors of our laws.

Among various tribes of North American Indians, social organization was developed to a remarkable degree. Every community of natives had a form of government. Laws, although unwritten, were strictly enforced, and deviation from them was punished.

LEGISLATIVE AND JUDICIARY

Tribal government was the prevailing type of this social organization. In most tribes, military and civil affairs were separate. The civil government was lodged in a chosen body of chiefs of several grades, usually organized as a council, exercising legislative, judicial and executive functions in tribal affairs. In some parts of the country, women held office as chiefs.

"Both in the lowest and the highest form of government the chiefs are the creatures of law, expressed in well-defined customs, rites, and traditions." (Bulletin 30, Bureau of American Ethnology).

The Omaha were divided into ten gentes, each with a chief. Seven of these chiefs constituted a sort of oligarchy, and two of them exercised superior authority.

Among the Nootka, the tribes were divided into gentes, the heads of these divisions forming a council which determined the action of the tribe.

At the pueblo of Zuni, the governor attends to most civil matters, but the appointing body, consisting of certain priests, is the final court of appeal in matters of extreme importance.

In the greater part of the gulf area, the ruling power of the chiefs was very great. The Wateree were more like slaves than subjects of their chief. However, the Sun, or great chief,

of the Natchez, had an advisory council which sometimes considerably curtailed his authority.

The Abnaki had two councils, the grand and the general. The grand council, consisting of the chiefs and two men from each family, determined important tribal matters, and pronounced death sentences.

"When the (Chickasaw) chiefs thought it necessary to hold a council, they went to the king, and requested him to call a council. He would then send one of his runners out to inform the people that a council would be held at such a time and place. . . . All the talking and business was done by the chiefs. If they passed a law they informed the king of it. If he consented to it it was a law; if he refused, the chiefs could make it a law if every chief was in favor of it. If one chief refused to give his consent the law was lost." (Schoolcraft, quoted by Swanton, in Ann. Rep. 42, Bureau American Ethnology.)

The Chickasaw constitution of 1840 was an improvement over the unwritten laws of the tribe. The monarchial government was abolished and republicanism established. When the Chickasaw moved west, they agreed to adopt the Choctaw laws, by which a chief was elected every four years and captains every two years, the judges being elected by the general council. In 1856 the Chickasaw separated from the Choctaw and established an independent government on the same pattern.

The Creeks considered that "what was not done in the public square, in general council, was not binding on the nation." They held an annual general assembly in a principal village, where the chiefs must assemble to consider all matters of importance to the nation and its allies.

"Though the nation is summoned in what is termed their grand council, when the state of the nation is supposed to be examined into, and their oral laws made, the assembly say not a word in the matter. . . A few chiefs in the council house make the laws for their government, without condescending to ask an opinion or approbation in any case, the national body being merely convened to hear what is done, for after a law is digested by the chiefs, the national convention is informed of its tendency by the orator of the nation in a very

exact and precise manner." (Stiggins, quoted by Swanton, op. cit.)

Stiggins goes on to say: "They are the most obedient subjects under the sun to the penalties of it (the new law), be it oppressive or not. Should they infringe the law they will suffer beating, confiscation of their property or even death without a murmur or family resentment."

General E. A. Hitchcock, also quoted by Swanton, had this to say: "In each town there are persons called *lawyers,* from four up to 40 or even 45, according to the population, whose duty it is to execute the laws." Swanton comments: "By 'lawyers' we are evidently to understand leading men conversant with the customs and usages of their people." This strikes the writer as being a definition of the term as applicable to the modern exponent of the law as it was to the Creek.

General Hitchcock continues: "The general council for business is composed of the two principal chiefs and the Kings, including those of the Towns. . . There is another branch composed of one or two persons elected by each town from among the lawyers with one judge from the Upper and one from the Lower Creeks, which constitute what is called a Committee. . . Sometimes the number of the Committee is increased on important occasions. . . A law generally originates in the Committee. If approved there it is sent to the principal chiefs for their approval. If approved by the principal chiefs it is a law. But practically the chiefs make the laws and unmake them."

While slightly ambiguous, the purport of the foregoing seems to indicate that Creek politics were considerably like our own.

DESCENT

Lineal descent, inheritance of personal and common property, and the hereditary right to public office and trust, are traced through the female line in many tribes (clan), through the male line in others (gens). For instance, consanguine kinship is traced through the blood of the woman only, among the Iroquoian and Muskhogean tribes. How-

ever, by the legal fiction of adoption, citizenship in the tribe could be conferred upon an alien.

The primary unit of the above named tribes is the Family, which comprises all the male and female progeny of a woman and of all her female descendants in the female line, and such persons as may have been adopted into it. The oldest woman in it is the head of the Family. It may be composed of one or more firesides.

The members of such a Family have the right to the name of the clan of which their Family is a member; the right of inheritance from deceased members; and the right to take part in Family councils. All the land of a Family was the exclusive property of its women.

On the contrary, among the Algonquians of the north and west, descent was reckoned in the male line.

The Omaha child also belonged to its father's gens, unless the father were a white or negro, in which case the child belonged to the gens of the mother.

Natchez chieftainship, although male, was transferred in the female line. Thus, when the great Sun died, his sister's son became Sun.

Such personal property of the Chickasaw deceased as was not destroyed or buried with his body, went to the brothers, sisters, or sisters' children.

Land, with the Zuni, passes to the daughters in preference to the sons.

Eakins, quoted by Schoolcraft, says: "The descent of (Creek) property is fixed. It is willed as the parents please. But if no will has been made, the property reverts to the children. . . A written will is binding. A verbal will, established by two respectable persons, is valid also. . . In former times, all relics were taken possession of by the deceased's sister's eldest son. But now they are the subject of legacy as other property."

Swanton (op. cit.) comments upon this: "This statement, of course, dates from a comparatively late period in the history of the Creek Indians, about the year 1850."

LAND AND PROPERTY RIGHTS

Occupancy was the only form of land tenure recognized by the Indian. Thus, in certain tribes, as long as a man cultivated his tract of land, his title was not disputed, but if he neglected it, anyone who desired might take it.

Property rights are vested among the Tule of Darien, Southeastern Panama, partly in the community or village, in which case any individual in the village has a right to the wood, fruit, or hunting rights, as the case may be. A second class of property, such as household goods, is the hereditary property of the women. Ownership of money and crops is vested in the men who have the energy to plant and tend the plantations.

Similarly, Chickasaw lands were held in common, except for the use-ownership of those who built houses or cleared fields in certain places.

Kwakiutl hunters own their hunting grounds, and fight trespassers so fiercely that generally one or both are killed. The same holds with berry-picking grounds, rivers, fish traps, etc.

In such regions as California, the killing of game upon the land of adjoining tribes was rigidly prohibited and sternly punished.

Among the Creeks, Chickasaw, and Choctaw, land was controlled by the towns, but the tribe as a whole exercised a sort of eminent domain. This was usually latent, appearing especially when the town wanted to part with lands to outsiders. Within the town, ownership depended on occupancy, and was terminated with it.

MARRIAGE AND DIVORCE

Among the Eskimos, marriage is barred within specified degrees of kinship. There is no wedding ceremony. Monogamy is prevalent, but there is no law against a successful hunter, who can afford them, having several wives. Divorce is informal—either party may leave the other on a slight pretext and may remarry. Children generally remain with the mother.

On the northwest coast, marriage between members of the same clan is forbidden. The Kwakiutl purchases his wife, and must renew the payment under certain conditions, else the marriage is annulled. If the husband expels his wife from caprice, he must return her dowry. If she has been unfaithful, he keeps the dowry, and may demand the gifts he gave her parents.

Some California tribes have a real purchase of wives; some merely ratify the marriage by an exchange of gifts. Divorce is easily accomplished at the husband's wish, and where the wives have been bought, the money is refunded. Among the Hupa, the husband may claim only half of his payment if he keeps the children.

Pueblo laws are the exact opposite. The husband is adopted as a son by his father-in-law, and married life begins in his wife's home. Thus she is mistress of the situation: the children are hers, as also the house, household goods, and grain in storage, and she can order her husband to leave, should occasion arise.

Marriage among the Creeks gave the husband no right over his wife's property, and if divorced, she kept the children.

The Winnebago man generally lived with his parents-in-law during the first two years after marriage. Throughout this time, he was practically the servant of his father-in-law, hunting, fishing, and performing minor services for him.

Among the Huron and Iroquois, the proposal of marriage had to be submitted to the woman's council by the girl's mother, and their decision was final.

The Plains Indians practiced polygamy, the younger sisters of the first wife being potential wives of the husband. Among the Pawnee and Siksika, gifts to the girl's parents were an essential part of the marriage ceremony. In case of elopement, the girl and her family were disgraced unless subsequent gifts legitimized the marriage. A man had absolute power over his wife, hence separation and divorce were common.

Among the Natchez, the ruling class was not allowed to inter-marry, but was compelled to marry into the common people.

A Chickasaw widow must remain single for from two to three years, but widowers could remarry as soon as they desired.

In eastern Carolina, whoever married a widow must assume all of her late husband's debts.

CRIME AND PUNISHMENT

Murder between tribes was usually a preliminary to war. Within tribes, it was generally punished by the relatives of the murdered man, who killed the slayer or one of his relatives of equal rank. However, in eastern North Carolina, shell money was so esteemed that murder could be compounded by its means.

Murder was always punished by death, among the Chickasaw. If one of this tribe killed another, he was in turn killed by relatives of the slain man. If the murderer could not be found, it was lawful to kill his brother.

On the other hand, when a murder was committed among the Osage, and a relative of the slain person threatened the life of the murderer in revenge, it was the duty of the chief to compel the relative to keep the peace. If he persisted, he was expelled from the tribe. The chief required the murderer to bring gifts to the relatives of the slain man as a peace offering.

Adair, quoted by Swanton (op. cit.) mentions a Creek law: "If an unruly horse belonging to a white man, should chance to be tied at a trading house, and kill one of the Indians, either the owner of the house or the person who tied the beast there, is responsible for it, by their *lex talionis.*"

Swanton also quotes Gregg, concerning Creek laws of punishment: "Murder, rape, and a third conviction of stealing, are punished with death, usually by shooting."

Stealing, for the first offense, was punished by whipping; for the second, by cutting off the ears of the guilty person; and for the third, by death.

Neglect of the regular morning plunge among the Creeks was deemed a heinous crime, and was punished by dry scratching.

In Virginia, offenders of various sorts were made to kneel and were then beaten. In Florida, one who had failed in sentinel duty was struck several times over the head with a club.

MISCELLANEOUS LAWS

From Virginia as far as the Mississippi, every individual, old and well enough, must bathe in the nearest running water the first thing every morning. This rule was particularly applicable to the men, who began the practice in early boyhood, and kept it up all their lives.

No Winnebago man was allowed to talk directly to his mother-in-law, or to look at her. The same rule applied to the woman and her father-in-law.

In the southeastern United States, the married women of child-bearing age, of a clan, had the right to hold council to choose candidates for chief and sub-chief of the clan. They also had the right to impeach chiefs and sub-chiefs.

The Kwakiutl had a form of tribute to their chiefs: when seals were taken, they kept one for their families, and gave the rest to the chief. Half of the mountain goats, twenty or more of every 100 salmon, etc., were the tributes exacted.

The following is the form of oath used among the Chickasaw: "Do you not lie? Do you not, of a certain truth?" was asked of the witness, and he replied: "I do not lie; I do not, of a certain truth."

LAWYERS

In early Indian times, as in modern days, the lawyer and the statesman were practically one and the same. Referring back to the definition of lawyers, as "leading men conversant with the customs and usages of their people", this is seen to be true.

Among ancient lawyers, the names of Dakanawida and Hiawatha are most prominent and many of the constitutional principles, laws, and regulations of the Iroquois confederation (which, by the way, was the first union of states north of Mexico), are attributable to Dekanawida. Hiawatha, his brilliant disciple, deserves to be more widely known than he

is, because he was the proponent of the original League of Nations and the early advocate of universal peace. By his unceasing efforts, Hiawatha caused the Oneida, Mohawk and Cayuga to adopt his ideas, and they in turn persuaded the Seneca and Onondaga to confederate with them. This was the original League of Nations.

At the present time, there are many prominent lawyers who claim Indian lineage including such men as Vice-President Curtis, (Kaw), Ex-Senators Robert L. Owen (Cherokee), Matthew S. Quay (Abnaki), Paul O. Husting (Menominee), and John Randolph (Powhatan), and Representative William W. Hastings (Cherokee).

BAR PRIMARY REPORT

June 20, 1930

Judge John H. Denison, President,
Denver Bar Association,
Equitable Building,
Denver, Colorado.

Dear Sir:

Your Judiciary Committee begs leave to report that following the adoption of the formal report of the Committee, dated May 7th by the membership of the Denver Bar Association at a noonday meeting at the Chamber of Commerce, your Committee, on May 25th sent to each member of the Denver Bar a copy of the Committee's formal report with the request that nominations of candidates for the district bench of this County be submitted in writing not later than five o'clock P.M. on May 21st, 1930.

Within the time named seventy-six candidates were nominated and on the same day, May 21st, a letter was sent to each asking for a written acceptance or rejection of the nomination. Just twenty-five of the seventy-six accepted the nominations.

On May 24th the Committee mailed Bar Primary Ballot No. 1 to all resident Denver lawyers, requiring them to vote for seven candidates and that ballots be returned to the Secretary by five o'clock P. M. on May 28th.

Five hundred ninety-three votes were cast on Ballot No. 1 and two candidates having tied for fifteenth place, Ballot No. 2 was prepared with sixteen candidates' names requiring that it be returned to the Secretary by noon June 3, 1930.

Six hundred eight-five votes were cast on Ballot No. 2, resulting in the elimination of six candidates. The final ballot contained the names of ten candidates to be returned to the Secretary not later than ten o'clock A. M. on June 7, 1930.

Seven hundred one ballots were cast and the following in alphabetical order were the seven highest of the ten candidates voted for: E. V. Holland, Frank McDonough, Sr., Charles C. Sackman, Fred W. Sanborn, Sr., James C. Starkweather, Robert W. Steele, Barnwell S. Stuart.

Your Committee therefore reports that the seven candidates above named represent the choice of the Denver Bar for election to the District Court of the City and County of Denver.

It is the belief of the Committee that in the Bar Primary so conducted, the Denver lawyers as a whole expressed their choices in the non-partisan spirit in which the plan for this Bar Primary was prepared, as is indicated by the fact that when the candidates were reduced to ten in number, five were Republicans and five were Democrats, and of the seven selected as the final choice of the Bar, three are Democrats and four are Republicans.

The Committee recommends that the Denver Bar further pursue its determination to have a non-partisan Judiciary by exerting themselves to secure the nomination and election of the seven candidates chosen by the Bar Primary.

The Judiciary Committee, finding that one of their number was a candidate at the Bar Primary formally appointed a Bar Primary Committee consisting of the following, D. W. Strickland, Chairman, William E. Hutton, Ira C. Rothgerber and Richard H. Hart. This Committee conducted the entire Bar Primary.

Very respectfully,

(Signed) D. W. STRICKLAND,
Chairman, Judiciary Committee.

COLORADO SUPREME COURT DECISIONS

(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS—NO. 12299—*Case Threshing Machine Company vs. Deezautti—Decided June 2, 1930.*

Facts.—This was an action on a promissory note for $350. The plaintiff's evidence tended to show that the note had been paid. Defendant had possession of the note and claimed payment. Plaintiff contended that the note was mailed to the defendant by mistake, and furthermore that the note was not marked paid. A verdict was had for the defendant and the plaintiff alleged error in the refusal of the Court to give instruction to the effect—

1. That the mere fact that the plaintiff was a corporation should make no difference with the finding of the fact by the jury.

2. That circumstantial evidence is legal evidence, and it is often more reliable than the direct statements of witnesses.

Held.—1. It is within the discretion of the Court to grant or refuse an instruction such as this, and there does not appear to be any abuse of that discretion.

2. "The tendered instruction as to circumstantial evidence was properly refused, if for no other reason because there was no proper definition of circumstantial evidence."

3. Being ample evidence to support the verdict it will not be disturbed by this Court.

Judgment Affirmed.

CONTEMPT—ORIGINAL PROCEEDINGS—NO. 12602—*People, ex rel Attorney General vs. Thomas—Decided June 16, 1930.*

Facts.—The respondent, a licensed attorney for the state of Missouri, saw an accident in which a minor was injured. He subsequently offered to take up the case for the parents

of the injured boy. Later, he had professional cards printed, and after this, he petitioned for leave to take the examination for the Colorado Bar. He filed a complaint in the above injury case, signing himself as Attorney for the Plaintiff. Upon consultation with a local firm, he was advised that upon securing permission from the trial court, he could act as an attorney in the anticipated action. The record did not show that any such permission had been obtained, but it did show that the respondent at all times thought that he had permission. The commissioner who conducted the hearing recommended leniency "since the respondent acted in the belief that he was within the rule of comity and usage."

Held.—Respondent adjudged in contempt and ordered to pay $50 and costs or to go to jail for 10 days.

CRIMINAL LAW—FIRST DEGREE MURDER;—TIME FOR TRIAL—ADEQUACY OF;—VENUE—MOTION FOR CHANGE OF;—PLEA OF GUILTY—RIGHT TO CHANGE;—OTHER CRIMES—EVIDENCE OF—ADMISSIBILITY OF;—MITIGATING CIRCUMSTANCES—EVIDENCE OF;—INSTRUCTIONS—REFUSAL OF;—MOTION FOR NEW TRIAL—REFUSAL OF—No. 12558—*George J. Abshier vs. People—Decided June 9, 1930.*

Facts.—The defendant pleaded guilty of his activities in the robbery of The First National Bank at Lamar, Colorado. He was convicted of first degree murder, though he did not perform the killing himself, and was sentenced to death. The facts are well known and will not be set out here. Many allegations of error were set out, the important ones being as follows: 1. The crime of which defendant was convicted and the gist of the defense, 2. refusal of the trial court to grant continuance of two weeks instead of six days allowed, 3. refusal to change place of trial for alleged prejudice of inhabitants, 4. alleged bias or prejudice of jurors, 5. refusal to permit defendant to change plea of guilty to not guilty, 6. admission of evidence of other crimes connected with the crime charged, 7. evidence in mitigation or aggravation of offense, 8. instructions to the jury, 9. time for presenting motion for new trial, and denial of motion when presented.

Held.—1. "If the homicide in question was committed by one of his (defendant's) associates engaged in the furtherance of the common purpose to rob, he is as accountable as though his own hand had intentionally and actually fired the fatal shot and is guilty of murder in the first degree."

2. Six days having been allowed, the refusal of the court to allow two weeks for the defendant's counsel to prepare their case was not error. The gravity of the crime is not the sole standard for determining the length of time that a defendant shall have before he be tried. "If it were, an outlaw could rest assured that the greater the enormity of his offense, the longer time he would have to evade its consequences."

3. "The granting or refusal of a motion for a change of place of trial is one of the many matters wisely lodged in the discretion of the trial court, and in the absense of abuse, the order will not be disturbed."

4. The most prejudicial juror named by the defendant was one who testified that he had not arrived at any conclusion as to the defendant's punishment, nor had this juror been challenged for cause. There was no error here.

5. "An application to change a plea is addressed to the sound discretion of the court. Its ruling will be reversed only for abuse of that discretion resulting in prejudice."

6. Evidence of other crimes committed by the defendant was admissible insofar as it was essential for the purpose of placing a related story of the crime here involved before the jury. "Where relevant evidence is offered, it may be admitted notwithstanding it may disclose another indictable offense." "Such evidence is also admissible to show an aggravated crime, or in mitigation if there had been any such circumstances."

7. The reason the defendant did not prove mitigating circumstances was because there were none to prove; not because evidence thereof was excluded. The burden of proving circumstances of mitigation is upon the defendant.

8. It is not error to refuse instructions which correspond to those given. Nor can a party complain when the instruction given is more favorable than the one refused.

9. It is within the discretion of the court to grant leave to even file a motion for a new trial. Even more so, then, is it within the courts discretion to allot the time within which such a motion can be made.

Judgment Affirmed with orders to execute it during the week of July 19.

No. 12,559—*Howard L. Royston vs. People—Decided June 9, 1930.*

The facts here involved were, with the exception of a few details, the same as those in Abshier vs. People, *ante*. The assignments of error are substantially alike, and the judgment is sustained upon the same grounds.

Judgment Affirmed with orders to execute it during the week of July 19.

CRIMINAL LAW—FIRST DEGREE MURDER—CONFESSIONS—INDUCEMENT OF BY PROMISE OF IMMUNITY FROM DEATH—VALIDITY OF PROMISE; — JURORS — PREJUDICE OF — NO. 12580—*Ralph E. Fleagle vs. People—Decided June 9, 1930.*

Facts.—This is a companion case to Abshier vs. People, ante; and Royston vs. People, ante. The case involves only three elements which are not already discussed in the Abshier case, namely: (1) The alleged agreement pertaining to the penalty to be inflicted on the defendant; (2) Bias or prejudice of a juror; (3) Alleged prejudicial remarks by the special prosecutor.

Held.—(1) The defendant claims that he was promised immunity from the death sentence in lieu of his confession. Attorneys for the prosecution deny any such agreement, but state that they promised not to *ask* for the death penalty. The record shows that the death penalty was not asked, although instructions which sought to direct the verdict for life imprisonment were denied.

"Jurors are constitutional officers; they have their appointed function to perform, one of which is to fix the penalty in a case of this kind submitted to them. The court can not lawfully usurp this power, nor set aside the legislative will, and the trial court wisely refrained from doing so when requested

by an erroneous instruction tendered by the defense and refused. No one may acquire a power of attorney from the jury to make a 'compact' on its behalf."

(2) Affidavits of statements made by one of the jurors before trial were produced, the substance of which was that the juror would "stay in the jury room forever before I return any verdict except one of death." This juror, by affidavit, denied having made such a statement.

"The killing is admitted. The circumstances attending the homicide were such as to provoke comment, and it would tend to obstruct the administration of justice, with little benefit to persons accused of crime, to hold that remarks derogatory to a defendant would disqualify one to act as juror."

(3) Objection was made that the remarks to the jury by the special prosecutor were too severe. "It is impossible for us to think of any language that could have been used stronger than the evidence itself." Even so, the court asked the jury to disregard these remarks. "The prosecution did not ask for the death penalty, but the evidence urged it."

Judgment Affirmed with orders that it be executed during the week of July 12.

DECEIT — RESTRICTION OF ALIENATION — DAMAGES — NO. 12378—*Chandler vs. Ziegler—Decided June 16.*

Facts.—Action for deceit. Plaintiff purchased a lot from a group owned by the defendant upon the representation that all of the lots therein were restricted so that they could never be sold, leased, or occupied by a colored person. Plaintiff alleged that the lot adjoining his was sold to a Japanese.

An instruction given by the court directed the jury to allow additional damages "sustained by reason of annoyance and inconvenience." The jury awarded the plaintiff $400.

Held.—The evidence of the difference in the value of the lot was sufficient to go to the jury. The error in the instruction as to the measure of damages necessitates a reversal. "The measure of damages where the property would be more valuable had the representation been true is the difference between the actual value of the lot at the time of its purchase, and what its value would have been had the representation been true."

(2) "A person owning a body of land and selling part of it may, for the benefit of his remaining land, lawfully impose certain restrictions upon the use or occupancy of the land sold."

" . . . the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to utter subversion of the estate, such as prohibit entirely the alienation or use of the property."

Judgment Reversed and remanded for a new trial on the question of damages only.

GIFTS INTER VIVOS—LOTTERIES—NO. 12298—*Hardy vs. Carrington—Decided May 26, 1930.*

Facts.—The Western Colorado Fair purchased an automobile from the Carrington Chevrolet Company which was raffled to the plaintiff at a fair held in Montrose, Colorado in September 1927. The plaintiff expressed his dissatisfaction with the car and did not take it. The plaintiff's father declared his opposition to gambling and the final outcome was that the father and son agreed to give whatever interest the son had in the car back to the association, with the understanding that it would be sold to pay premiums due from the association to exhibitors. Pursuant to this understanding, the association returned the car to the Carrington Company who in turn returned the purchase check to the association. Subsequently, the plaintiff decided he wanted the car and sought to rescind his gift. To a judgment for the defendant, the plaintiff alleged error.

Held.—(1) "If it were necessary to pass upon the validity of this plan or scheme to attract visitors to the fair, we might be compelled to declare the entire plan illegal and that the plaintiff was entitled to no relief whatever in any view of the case."

(2) There was a valid gift by the plaintiff to the association. "The essentials of a completed gift *inter vivos* are: 1. A clear and unmistakable intention to make the gift; and, 2.

A consummation of such intention by those acts which the law requires to divest the donor and invest the donee with the right of property."

Judgment Affirmed.

INSURANCE—ACCIDENT POLICIES—SUICIDE CLAUSE—NOTICE —NO. 12464—*Massachusetts Protective Association, vs. Nora V. Daugherty.—Decided May 26, 1930.*

Facts.—The plaintiff's husband carried an accident policy with the defendant company. More than a year after the policy was executed, the insured committed suicide. The court found that he was insane at the time of the suicide. The Plaintiff did not give notice of the death of the insured to the defendant for more than two years after the suicide and her claim then was denied by the company which called attention to the provision of the policy which provided that the company would not be liable on the policy if the insured committed suicide while either sane or insane. Judgment was rendered for the plaintiff, and the defendant alleged error.

Held.—1. The C. L. '21, Sec. 2532 provides that suicide, committed after one year from the issuance of a policy, while either sane or insane, shall be no defense against the payment of a life insurance policy. This provision has been held applicable to accident policies also.

2. Notice to the company was unnecessary in this case because:

A. Upon learning of the invalidity of the suicide exemption provision of the policy, notice was immediately given by the plaintiff.

B. "The absolute refusal of an insurer to pay the loss in any event waives compliance with a provision requiring notice and proof of loss."

Judgment Affirmed.

JUDGMENTS—MOTION TO SET ASIDE—FRAUD AS GROUNDS FOR—NO. 12415—*Gardner vs. Rule—Decided June 16, 1930.*

Facts.—The plaintiff was the payee in a cognovit note made by the defendant. Without service on or appearance by

the defendant, the plaintiff recovered judgment. More than a year after the term in which this judgment was had, had expired, the defendant asked to have the judgment set aside, alleging payment prior to the original action, and contending that the judgment constituted a fraud upon him. Upon the hearing, it was ordered that the judgment be set aside and the defendant be permitted to answer. To the answer which alleged payment, plaintiff filed his replication denying payment. The jury returned a verdict for the defendant.

The plaintiff relies chiefly upon the provision of the code which permits relief from a judgment upon proper showing made prior to six months after the adjournment of the term in which the judgment was rendered.

Held.—" . . . a proceeding to cancel a judgment procured by fraud is not barred by the limitation of one year . . ." " . . . a judgment thus procured is not merely a fraud upon the judgment debtor but also upon the court that gave the judgment."

Judgment Affirmed.

LACHES—STATUTE OF LIMITATIONS—ESTOPPEL—NO. 12489 —*Greeley Gas and Fuel Co. and Ocean Accident and Guarantee Corporation, Ltd. vs. Thomas—Decided June 16, 1930.*

Facts.—In 1919, the Plaintiff Thomas was injured while employed by the defendant fuel company. Final judgment was had for the plaintiff in 1929. The injury had been caused by a third person, one Lohrey, against whom the plaintiff secured a judgment for $10,000, which was never satisfied.

The defendant sets up two defenses, namely; the Statute of Limitations (the Plaintiff had not given notice within the one year as required by the statute.) and Laches. The plaintiff contended that the defendant is estopped from asserting these defenses. The evidence which supported the plaintiff's contention of estoppel was that the plaintiff had proceeded against the third party upon the advice of the defendant and with the "acquiesence and encouragement" of the insurance company. There was no evidence of damage to the defendant or the Insurance company because of the delay. Judgment was had below for the plaintiff.

Held.—A defendant can not seek to avoid his liability by pleading the Statute of Limitations or Laches, when the plaintiff has delayed his action with the acquiesence and encouragement of the defendant, for the express purpose of decreasing the defendant's loss.

Judgment Affirmed.

MORTGAGE—FORECLOSURE OF—NEGOTIABLE INSTRUMENTS—ENDORSEMENT — EVIDENCE OF — LACHES — NO. 12289—*Middlesex Safe Deposit & Trust Company vs. Frankie Jacobs, formerly Wason, and Lily Gaffner.—Decided May 19, 1930.*

Facts.—This was an action to foreclose a mortgage deed on real estate executed by the defendant in favor of one Coram and alleged to have been assigned to the Plaintiff. The plaintiff introduced the note, which was admitted to have been executed, and rested. The defendant set up three affirmative defenses of which two are considered, namely: 1. That the note and mortgage were executed without consideration, but merely as an act of friendship to aid Coram in securing some ready cash, and with the understanding that the defendant would never be held on the instruments. This defense further alleges that she had no notice of the alleged assignment and sale to the plaintiff until long after this assignment and sale were supposed to have taken place. 2. That the plaintiff had been guilty of laches insofar as it had failed to prosecute its rights diligently, and that if the plaintiff had so proceeded, the defendant would have had a remedy against the payee, Coram, who had gone bankrupt long before the defendant was given notice of this action. The lower court held for the defendant and the plaintiff alleges error.

Held.—1. Where there is a denial of the assignment and endorsement of a mortgage and promissory note, both the execution and the endorsement must be established by competent proof. The mere introduction of the instrument into evidence is insufficient.

2. When a creditor has in his hands the promissory note of a third person as collateral for a loan to a debtor who subsequently becomes bankrupt, it is the creditor's "duty to

file its claim . . . in the bankruptcy proceedings, which it did not do," before it can hold the third party.

Judgment Affirmed.

NEGOTIABLE INSTRUMENTS—FRAUD—TRUSTEE IN BANKRUPTCY IS PURCHASER WITH NOTICE—NO. 12300—*Investors Finance Company vs. Joseph Bodnar—Decided June 9, 1930.*

Facts.—The plaintiff sued upon a promissory note for $750 upon which the defendant had paid $300. The plaintiff claimed to be a bona fide purchaser for value. The defendant admitted the execution of the note, but pleaded no consideration. The answer further sets out that the payee of the note, the Thrift Mercantile Company, had secured the defendant's subscription to stock on representations that the Thrift Co. would build a large store from which the plaintiff could purchase goods at a discount of 30%. The answer further states that no stock had ever been issued to the defendant. The replication alleged that the note was given for 100 shares of preferred stock in the Thrift Mercantile Company, the payee of the note, and that the Thrift Mercantile Company was adjudicated a bankrupt. The replication further states that this note, as part of the assets of the Thrift Company, was turned over to the Plaintiff by the Trustee in Bankruptcy as partial payment of a debt of $126,000 which the Thrift Company owed the plaintiff.

The evidence showed that the plaintiff company and the Thrift Company were mostly composed of the same individuals, that they had adjoining offices, and employed the same attorney. Judgment was had for the defendant.

The questions presented by the writ of error were:

1. Was there a failure of consideration for the note.
2. Was the plaintiff a holder in due course without notice.

Held.—1. While the false representations here were insufficient to sustain an action for fraud, insofar as they were made as to the future acts of the company, the defense was lack of consideration, not fraudulent representation. The lack of consideration is clearly shown.

2. The validity of a note in the hands of a bankrupt can not be determined by the proceedings in bankruptcy in which the maker of the note had no opportunity to be heard. Neither the trustee in bankruptcy, nor those who claim under him, can be considered as bona fide purchasers for value without notice—they merely step into the shoes of the bankrupt.

3. An unfulfilled promise will not be deemed such consideration as will support an action to recover on a promissory note, and as against all but a bona fide purchaser for value without notice lack of consideration is a good defense.

Judgment Affirmed.

PARTITION—COLLATERAL ATTACK—NO. 12314—*Second Industrial Bank vs. Marshall—Decided June 16, 1930.*

Facts.—Plaintiff seeks partition and sale of lands, alleging itself to be a tenant in common with the defendant. Defendant denied the plaintiff's interest and further alleged that the plaintiff obtained a judgment against one "Thomas" Marshall in justice court for $132.20, and that the justice certified a "pretended transcript" on the judgment to the district court, but that it appeared from the transcript that no execution was ever had upon the judgment; the defendant further alleged that "James" Marshall, the defendant's husband, had at all times been able to satisfy the justice court judgment, and that James Marshall was the owner of an undivided half of the land in question and that the defendant was the owner of the other undivided one half, and that the entire property had been homesteaded. The district court issued a fi fa pursuant to which a sheriff's deed was issued to the plaintiff. The defendant contended that this deed was a cloud upon her title. It was further alleged that two months after the sheriff's deed was issued, James Marshall tendered to the plaintiff $157.50 as full payment of principal interest, and costs, and that this tender was refused. The plaintiff's replication admitted all of the defendant's allegations except that the deed was a cloud on the defendant's title, and alleged that the homestead was entered subsequent to the date of the sheriff's deed. The court sustained a demurrer to the replication and dismissed the suit. The writ of error

presents these questions; (1) Must execution issue on a justice court judgment and be returned unsatisfied, before a transcript thereof can be legally filed? and (2) Can the plaintiff's sheriff's deed be collaterally attacked?

Held.—It is unnecessary to answer the first question because defendant "is a stranger to plaintiff's title and has no interest in the outcome of this action. Her attack thereon is collateral and cannot be maintained."

Reversed and Remanded.

Note: The opinion shows no connection between Thomas and James.